Tan Ah Tong v Gee Boon Kee & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–287 OF 2000
DENIS ONG, ALAUDDIN AND ABDUL AZIZ MOHAMAD JJCA
14 DECEMBER 2005

Civil Procedure — Appeal — Grounds of judgment — Absence of — Whether new trial must be ordered

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The first defendant, being one of the vendors of two pieces of lands had entered into sale and purchase agreements with 29 purchasers ('the plaintiffs'). The first defendant refused to perform the agreements and submitted that he had terminated most of the sale and purchase agreements because the plaintiffs had been in breach by failing to pay in full the purchase price and other sums due under the agreements. The learned High Court judge gave judgment for the plaintiffs for specific performance of their sale and purchase agreements. The first defendant appealed. There were no grounds of judgment, the trial judge having gone on retirement soon after delivering his judgment, without preparing them. In his submission in the appeal, learned counsel for the first defendant persuaded the court of the need for a new trial of the action resulting from the absence of the judge's grounds of judgment. Counsel argued that the issue regarding the capacity of the vendors' solicitors and stakeholder, one lawyer by the name of Mr Kirpal Singh Brar, who had since absconded with the purchaser's money, necessitated a new trial.

Held, dismissing the appeal:

(1) Where a judge does not state his reasons for arriving at his decision, the decision is not necessarily unsafe. He may have properly considered and weighed the evidence and may have arrived at the right conclusions. The decision is only unsafe in the sense that the appellate court is unable to determine, from an assessment of the judge's mental processes, that the decision is correct. But it does not follow that the course open to the appellate court to decide the appeal while doing justice is to order a new trial. It is still open to the appellate court to assess the evidence and come to a finding whether or not the evidence vindicates the decision of the trial judge (see para 11).

(2) Where, in an appeal in a civil matter, as in this appeal, reasons for the decision appealed against are not available, and not obtainable, the appeal, onerous though this may be, should proceed on an examination and assessment of the evidence to enable the appellate court to decide whether the evidence justifies

the decision or otherwise. It will be as if the appellate court is sitting at first instance, except that the evidence is already before it. For reasons that are obvious or can easily be imagined, a new trial is undesirable and ought not to be ordered unless there is something crucial to a just decision in the case that can be established in the new trial but cannot be established on an assessment of the evidence. The evidence being all there already, such a thing must be very rare indeed (see para 12).

(3) There was no attempt to show why this court would not be able to resolve the issue on the capacity of Mr Kirpal Singh Brar by an assessment of the evidence. Of course written grounds were essential, without them the appellant was deprived of the knowledge of the manner in which the judge weighed the evidence, and of course that was prejudicial to the appellant, but, that did not make a new trial inevitable (see para 14).

[Bahasa Malaysia summary

Defendan pertama, salah seorang daripada penjual dua keping tanah tersebut telah memasuki satu perjanjian jualbeli dengan 29 pembeli ('plaintif tersebut'). Defendan pertama enggan melaksanakan perjanjian-perjanjian tersebut dan berhujah bahawa beliau telah membatalkan kebanyakan daripada perjanjian jual beli tersebut kerana plaintif tersebut telah melakukan perlanggaran kerana gagal untuk membayar harga penuh belian dan jumlah lain yang perlu dibayar di bawah perjanjian tersebut. Hakim Mahkamah Tinggi yang bijaksana telah memberikan penghakiman menyebelahi plaintif tersebut untuk pelaksanaan spesifik berhubung perjanjian-perjanjian jual beli tersebut. Defendan pertama telah merayu. Tiada alasan penghakiman, hakim perbicaraan telah bersara sejurus selepas beliau menyampaikan penghakiman, tanpa menyedianya. Dalam hujah beliau semasa rayuan, peguam yang bijaksana bagi pihak defendan pertama telah meyakinkan mahkamah tentang keperluan untuk adanya perbicaraan baru tindakan tersebut akibat daripada ketiadaan alasan penghakiman mahkamah. Peguam berhujah bahawa persoalan berhubung kapasiti peguam penjual dan pemegang amanah harta, seorang peguam bernama En Kirpal Singh Brar, yang telah melarikan diri dengan wang pembeli, memerlukan satu perbicaraan baru.]

Diputuskan, menolak rayuan tersebut:

(1) Di mana hakim tidak menyatakan alasan beliau untuk tiba kepada keputusannya, keputusan itu tidak semestinya tidak selamat. Beliau mungkin telah dengan sewajarnya mengambil kira dan menimbangkan keterangan dan mungkin telah tiba kepada kesimpulan yang betul. Keputusan itu tidak selamat apabila mahkamah rayuan tidak dapat menentukan, berdasarkan proses penilaian minda hakim, bahawa keputusan itu adalah betul. Namun ia tidak diikut bahawa proses itu terbuka kepada mahkamah rayuan untuk memutuskan rayuan tersebut dan juga untuk berlaku adil perlu adanya perbicaraan baru. Adalah terbuka kepada mahkamah rayuan untuk menilai keterangan dan tiba kepada penemuan sama ada atau tidak keterangan tersebut menjustifikasikan keputusan hakim perbicaraan (lihat perenggan 11).

(2) Di mana, dalam suatu rayuan dalam perkara sivil, seperti dalam rayuan ini alasan untuk keputusan yang dirayu terhadap tidak ada, dan tidak dapat diperoleh, rayuan tersebut, meskipun membebankan, patut diteruskan atas pemeriksaan dan penilaian keterangan untuk membolehkan mahkamah rayuan memutuskan sama ada keterangan itu menjustifikasikan keputusan tersebut atau sebaliknya. Ia seperti jika mahkamah rayuan bersidang untuk pertama kali, kecuali keterangan telah pun berada di hadapannya. Bagi alasan yang jelas dan mudah dibayangkan, suatu perbicaraan baru tidak diperlukan dan tidak patut diperintahkan kecuali jika terdapat suatu yang penting untuk memperoleh keputusan yang adil dalam kes itu yang boleh ditunjukkan dalam perbicaraan baru tetapi tidak boleh ditunjukkan dalam penilaian keterangan. Keterangan sedemikian yang telah sedia ada, adalah suatu yang jarang berlaku (lihat perenggan 12).

(3) Tiada percubaan untuk menunjukkan kenapa mahkamah tidak dapat menyelesaikan persoalan berhubung kapasiti En Kirpal Singh Brar melalui satu penilaian keterangan. Sewajarnya alasan bertulis adalah penting, tanpanya perayu terkilan pengetahuan cara bagaimana hakim menimbangkan keterangan, dan oleh itu akan memprejudiskan perayu, namun, itu tidak membuat suatu perbicaraan baru tidak dapat dielakkan (lihat perenggan 14).

Notes

For a case on grounds of judgment, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 3517.

For cases on grounds of judgment in appeals, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 941–943.

Cases referred to

English v Emery Reimbold & Strick Ltd [2002] 2 All ER 385 (refd)
Flannery v Halifax Estate Agencies Ltd [2000] 1 All ER 373 (refd)
Tan Hun Wah v PP and another appeal [1994] 1 MLJ 382 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 71(1)

Tommy Thomas (K Goik, KW Moh with him) (Nasir Kenzin & Tan) for the appellant.
Jagjit Singh Gill (Putra Gill) for the first, fourth, seventh, ninth, tenth, 13th, 16th, 19th and 27th respondents.
C Jegathesan (Asmah Azhari with him) (C Jegathesan) for the rest of the respondents except the 29th respondent.
Won Walter Pereira (Kamaruddin & Partners) for the appellants in Civil Appeal No W–02–288 of 2000.
Balbir Singh (KY Thong & Co) for the appellants in Civil Appeal No W–02–289 of 2000.

Abdul Aziz Mohamad JCA (delivering judgment of the court):

[1] In the High Court there were twenty-nine plaintiffs and six defendants. Against defendants 1, 2 and 3 ('the Vendors') plaintiffs 1 to 28 obtained an order of

specific performance of sale and purchase agreements in respect of unsubdivided lots of agricultural land. Being unsubdivided, we shall refer to these lots as 'sublots'.

[2] The following is a summary of the core averments in the amended statement of claim. In 1973, the Vendors bought two agricultural lands in the Mukim of Hulu Kelang, District of Gombak, Selangor, which we shall refer to simply as Lots 512 and 513, in order to carve out of them forty-one bungalow sublots to be sold. The Vendors caused to be drawn up a layout plan of the forty-one sublots and a standard cyclostyled form of sale and purchase agreement to which the layout plan was annexed to form part of it. The forty-one sublots were soon sold out. A sale and purchase agreement in the form drawn up as mentioned was executed for each sublot. The buyers of forty of the sublots were the twenty-nine plaintiffs (treating, for convenience, plaintiffs 19 and 23, who were actually substitutes of deceased plaintiffs, as buyers), and defendants 4, 5, 6, several of them buying more than one sublot. All that happened before the transfer of Lots 512 and 513 from the original owner was registered. The registration took place on 15 August 1973. Only defendant 1, one of the three Vendors, was registered as the proprietor, who soon after regarded himself as the sole vendor. Although the forty-one sublots had been paid for in full, and there was an undertaking in the sale and purchase agreements that the Vendors would apply for conversion of Lots 512 and 513 to building land and for their subdivision into forty-one lots, the undertaking was not fulfilled. Instead, on 11 February 1974, defendant 1 charged Lots 512 and 513 to the Chase Manhattan Bank and, on 5 April 1982, he applied for their conversion to building land and for their subdivision into fifty-five bungalow lots and a lot for a condominium of sixty units. These acts were said to be fraudulent. As to the one sublot (of the forty-one) that we have left out, sublot 37, in 1984 the buyer sold it to defendant 1. Paragraph 2 of the amended statement of claim grouped the buyers of the forty-one lots, namely, the twenty-nine plaintiffs, defendants 4, 5 and 6 and defendant 1 (buyer of sublot 37), under the description of 'the purchasers'.

[3] The plaintiffs maintained in the statement of claim that defendant 1 was the constructive trustee of Lots 512 and 513 for the purchasers. They sought a declaration to that effect and an order that defendant 1 perform all the vendors' obligations under the forty (or forty-one) sale and purchase agreements. One of the grounds set out in the amended statement of claim in support of the claim that defendant 1 was a constructive trustee of Lots 512 and 513 for the purchasers was that the registration of the land in the name of defendant 1 only and not in the names of all the three vendors was null and void. So, it was contended, defendant 1 held Lots 512 and 513 as constructive trustee for the purchasers.

[4] It is to be noticed that through the declaration that they sought the plaintiffs were claiming beneficial ownership of the entire Lots 512 and 513 and they were claiming it as a body for all the purchasers, their argument being, as reflected in para 10 of the amended statement of claim, that since all the forty-one sublots that Lots 512 and 513 comprised had been sold to the purchasers, then it was the whole of Lots 512 and 513 that had been sold to the purchasers. The plaintiffs' approach

apparently was to make the declaration of trusteeship of Lots 512 and 513 the basis for the order of specific performance that they sought in respect of the sublots for the benefit of the purchasers individually.

[5] The following is a summary of the essential points and defences raised in defendant 1's amended statement of defence. There were sale and purchase agreements for thirty-five sublots only, not forty-one, because there was no agreement with plaintiffs 19 and 23, because plaintiffs 25 and 26 bought one lot jointly as did defendants 4 and 5, and because the agreement with plaintiff 29 had been mutually revoked. Lots 512 and 513 were registered in the name of defendant 1 only because defendants 2 and 3 had relinquished their rights to defendant 1. Defendant 1 terminated most of the sale and purchase agreements because the buyers had been in breach by failing to pay in full the purchase price and other sums due under the agreements. As undertaken, applications for conversion of category of land use and for subdivision into forty-one lots had been made but there had been no decision yet on the applications. As to the charging of Lots 512 and 513 to the Chase Manhattan Bank, defendant 1, as registered owner, had the right to do so. As to the application of 5 April 1982, the subdivisional scheme was merely an alternative to the first (for 41 sublots), which had not been withdrawn or cancelled. As to defendant 1 being constructive trustee of Lots 512 and 513 for the purchasers, the requirements for the creation of a constructive trust had not all been satisfied. Defendant 1 contended that the plaintiffs' action was premature and misconceived because according to the sale and purchase agreements the sublots were to be transferred to those of the purchasers who had complied with the terms thereof only after individual titles to the sublots had been issued, whereas conversion of the category of land use and subdivision had not yet been approved. Limitation and laches were also raised.

[6] The amended statement of defence was met with a thorough amended reply. Our purpose in setting out the pleadings, which is to show the nature of the dispute between the parties and the main issues that were involved, does not necessitate the setting out of a summary of the reply, except as to one point. In response to the defence contention that the purchase price had not been paid in full, paras 15(2) and 22(3) of the amended reply averred that, as required by the agreements, the purchase price was paid to Messrs Kirpal Singh Brar, the vendors' solicitors, that the other two vendors (defendants 2 and 3) had admitted in their respective statements of defence that the purchase price had been paid in full, that Mr Kirpal Singh Brar of the said firm 'absconded from Malaysia' in 1976, that shortly after that defendant 1 gave notice to the purchasers that he had not received the balance of the purchase price, and that it was by that notice that the plaintiffs first had notice of defendant 1's fraudulent intention.

[7] The trial commenced on 15 November 1988. The defence witnesses gave evidence first. There were three of them, two being defendants 2 and 3. Defendant 1 did not give evidence. Twenty-two witnesses gave evidence for the plaintiffs. After hearing submissions on 13 May 1994, the learned judge reserved judgment. Almost three years later, on 23 January 1997, the statement of claim was amended. Submissions resumed and on 12 August 1998 judgment was reserved. On 15 May 2000, the learned judge gave judgment for specific performance of the sale and

purchase agreements for plaintiffs 1 to 28 against defendants 1, 2 and 3, although the plaintiffs sought the remedy against defendant 1 only. The judge did not make the declaratory order. No grounds were given. Plaintiff 29 was excluded probably because the judge, after hearing the evidence, accepted defendant 1's averment that the agreement involving plaintiff 29 had been mutually revoked.

[8] The judgment gave rise to three appeals: one by defendant 1 (No 287); one by defendants 2 and 3 (No 288); and one by defendants 4, 5 and 6 (No 289). Plaintiff 29 having been excluded from the benefit of specific performance, the respondents in each of the three appeals were plaintiffs 1 to 28. The complaint of defendants 4, 5 and 6 was that, they being among the Purchasers, specific performance should have been ordered for them as well against defendants 1, 2 and 3. So in appeal No 289 defendants 1, 2 and 3 became respondents 29, 30 and 31 in addition to the twenty-eight plaintiffs who were respondents 1 to 28. As to why those three persons became defendants and not plaintiffs, page 197 of the notes records Mr Gill, counsel for some of the plaintiffs, as stating that they were named as defendants because they could not be located, that is, we take it, when the twenty-eight (or twenty-nine) plaintiffs were making preparations to sue. If that is true, our guess is that the plaintiffs found it necessary to make them parties because the declaration of trusteeship that they sought concerning Lots 512 and 513 would affect the interests of the three persons as well, but since they could not at the time be located to join up with the plaintiffs, the way to make them parties was to make them defendants.

[9] It was defendant 1's appeal (No. 287) that we heard. There were no grounds of judgment, the trial judge having gone on retirement soon after delivering his judgment, without preparing them. In his submission in the appeal, the sole aim of learned counsel for the appellant (defendant 1), Mr Tommy Thomas, was to persuade the court of the need for a new trial of the action resulting from the absence of the judge's grounds of judgment. Counsel for the appellants in the other two appeals also participated in the hearing of appeal No 287 since if, on that appeal, a new trial was ordered the order would affect all parties. Since there was nothing else advanced in submission in support of the appeal, the result would be that if we disagreed with the plea for a retrial, the appeal must be dismissed.

[10] It was not Mr Tommy Thomas's contention that in law where no grounds of judgment are available for a civil appeal there must be a new trial. He had not been able to find any reported decision in Malaysia or England 'where absence or lack of grounds of judgment by a trial judge resulted in comments by an appellate court'. He could only rely on three cases where the grounds were available but there had been delay in their release or paucity of thinking in them and, he said, for either of those shortcomings the appellate court had criticized the court of first instance. The three cases are *Tan Hun Wah v Public Prosecutor and another appeal* [1994] 1 MLJ 382, *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, and *English v Emery Reimbold & Strick Ltd* [2002] 2 All ER 385. It would follow, reasoned Mr Tommy Thomas, that the appellate court would harshly criticize a trial judge who did not at all produce his grounds of judgment (see paras 3 and 8 of his written submission).

That may be so, but the question before us was not one of criticism but one of ordering a new trial. Justification for criticism need not also be justification for ordering a new trial.

[11] A similar kind of flawed reasoning was also apparent in paras 21 and 22 of the concluding part of the written submission, where it was submitted that because the absence of written reasons makes it 'impossible for an appellate court to determine how the trial judge discharged the vital function of appreciating evidence', his decision is 'unsafe' and because the decision is unsafe it is fitting and proper that a new trial be ordered under s 71(1) of the Courts of Judicature Act 1964. Where a judge does not state his reasons for arriving at his decision, the decision is not necessarily unsafe. He may have properly considered and weighed the evidence and may have arrived at the right conclusions. The decision is only unsafe in the sense that the appellate court is unable to determine, from an assessment of the judge's mental processes, that the decision is correct. But it does not follow that the course open to the appellate court to decide the appeal while doing justice is to order a new trial. It is still open to the appellate court to assess the evidence and come to a finding whether or not the evidence vindicates the decision of the trial judge.

[12] Where, in an appeal in a civil matter, as in this appeal, reasons for the decision appealed against are not available, and not obtainable, the appeal, onerous though this may be, should proceed on an examination and assessment of the evidence to enable the appellate court to decide whether the evidence justifies the decision or otherwise. It will be as if the appellate court is sitting at first instance, except that the evidence is already before it. For reasons that are obvious or can easily be imagined, a new trial is undesirable and ought not to be ordered unless there is something crucial to a just decision in the case that can be established in the new trial but cannot be established on an assessment of the evidence. The evidence being all there already, such a thing must be very rare indeed. One that readily comes to mind is credibility in a situation where there is only the testimony of witnesses to rely on, being non-expert witnesses, and the testimony on one side appears to be equally cogent as the conflicting testimony on the other side. In such a case it may be said that a new trial is necessary so that the new trial judge will, as the appellate court will not, be able to observe the demeanour of the witnesses and credit the version of him whose demeanour is more reassuring. Even so, a correct decision may be frustrated if the opportunity to testify again gives to the witness whose testimony is not true an opportunity to improve his deportment.

[13] We excluded expert witnesses from the discussion just now because the differences between experts are of an intellectual nature, with reason and analysis to support an opinion, so that an appellate court may, without the aid of demeanour, be able to decide which opinion to accept. This is suggested by *Flannery v Halifax Estate Agencies* [2000] 1 All ER 373, one of the three cases cited by Mr Tommy Thomas. It was a claim by the purchaser-owners of a flat against valuers. 'At trial', says the headnote, 'the case turned entirely on a dispute between the rival expert witnesses concerning the cause of cracks in the property's superstructure. Without providing

any reasons for his decision, the judge stated that he preferred the evidence of the valuers' expert witness, and accordingly dismissed the claim'. The Court of Appeal, in ordering a retrial, said:

> It should not be assumed that the court that (for whatever reason) failed to give reasons had no reasons. Here, for example, it seems likely that the judge believed he had said enough. In that we differ from him. But one alternative remedy to quashing the decision is to invite or require the court to give reasons (see where this is done in the administrative law context — *de Smith, Woolf and Jowell* pp 469-470 (paras 9–054–9–055)). We considered that here. But by the time we were seised of the case, more than a year had passed since the hearing. It would not have been realistic for the judge to reconstitute his reasons. But, in accordance with the new practice direction on leave to appeal, leave should be sought from the trial judge immediately after judgment is delivered. On the application for leave, if a 'no reasons' point is being taken, the potential respondents should consider inviting the judge to give his reasons, and his explanation as to why they were not set out in the judgment, in an affidavit for use at the leave application and at the hearing if leave be granted.
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> Accordingly, we do not regard this as an appropriate case to remit to the trial judge. Nor have we the evidence before us necessary to form our own view — for instance, we do not have the transcripts of the experts' evidence. Accordingly, we have no alternative but to allow the appeal, set aside the judgment, and order a new trial. The thing to be noted from that passage is that if the Court of Appeal had the evidence, such as the transcript of the experts' evidence, they would have formed their own view and decided the appeal accordingly instead of ordering a new trial.

[14] In his written submission, the question that Mr Tommy Thomas contended necessitated a new trial was dealt with in Part B (paras 10-19). It was about the capacity of Mr Kirpal Singh Brar, on which Mr Tommy Thomas had said in his oral submission that the whole case turned. According to para 12 of the written submission, in face of defendant 1's denial of receipt of full payment of the purchase price, the plaintiffs alleged that they made payment to Mr Kirpal Singh Brar who, in 1976, absconded, and this dispute as to the making of full payment raised issues as to whether full payment was in fact made to Mr Kirpal Singh Brar, whether payment to Mr Kirpal Singh Brar instead of to defendant 1 direct had been authorized by defendant 1, and whether Mr Kirpal Singh Brar, in receiving the payment, was acting as the agent of the purchasers or as the agent of defendant 1. The oral and written submissions of Mr Tommy Thomas referred to certain pieces of evidence pertaining to those issues, with the comment that in the absence of the judge's reasons it was not known how he evaluated the evidence. But there was no attempt to show why this court would not be able to resolve those issues by an assessment of the evidence. In fact, from the last sentence of para 9 of the written submission it appeared that the objective in treating of the question of payment to and capacity of Mr Kirpal Singh Brar in Part B of the written submission was to show that 'written grounds were essential and the failure by the trial judge to give them was highly prejudicial to the parties and to the Court of Appeal.' Of course written grounds were essential, of course without them the appellant was deprived of the knowledge of the manner in which the judge weighed the evidence, and of course that was prejudicial to the appellant, but, as we said, that did not make a new trial inevitable. There was the alternative of assessment of evidence by the appellate court, as to which Mr Tommy

Thomas only said, and that was in his oral submission, that it would involve going through 200pp of testimony and that it was not the duty of the Court of Appeal to examine the evidence in minute detail.

[15] All in all, we did not find that Mr Tommy Thomas had justified the appellant's plea for a new trial. It followed that the appeal had to be dismissed. We therefore dismissed the appeal with costs and ordered that the deposit be paid to the respondents towards account of taxed costs. We also gave liberty to the respondents to apply to the High Court for ancillary orders in respect of the relief of specific performance. As to appeals Nos 288 and 289, we adjourned them to a date to be fixed.

Appeal dismissed.

Reported by Loo Lai Mee